Public Prosecutor v Bird Dominic Jude

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–216–09 OF 2012
AZAHAR MOHAMED, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
17 SEPTEMBER 2013

Constitutional Law — Legislation — Constitutionality — Constitutionality of s 56A of the Courts of Judicature Act 1964 ('CJA') challenged by respondent — Whether s 56A of the CJA defeated purpose of acquittal and discharge — Whether s 56A of the CJA violated arts 5(1) and 8(1) of the Federal Constitution — Whether s 56A valid and binding law

Criminal Procedure — Arrest — Warrant of arrest — Arrest pending appeal — Respondent acquitted and discharged of offence of drug trafficking — Appeal against acquittal — Whether respondent could be arrested and committed to prison pending disposal of appeal against acquittal — Whether warrant of arrest issued against respondent was defective — Whether there had been substantial miscarriage of justice as a result of flawed terms of warrant — Balance of justice

The respondent, an Australian national, was charged and tried for trafficking in dangerous drugs, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952. He was acquitted and discharged of the offence in the High Court. The prosecution appealed to the Court of Appeal against the acquittal. The prosecution filed a notice of appeal and at the same time applied ex parte to the Court of Appeal under s 56A of the Courts of Judicature Act ('the CJA'), for an order directing the respondent to be arrested and held in remand pending the disposal of the appeal. A warrant of arrest was duly issued against the respondent. At the inter partes hearing of the applicant's motion, the applicant submitted that s 56A of the CJA was enacted for the sole purpose of securing the attendance of an accused person, who had been earlier acquitted by the High Court, in the hearing of the appeal against him. The respondent resisted this application and contended that the warrant of arrest issued against him was defective in that it contained inaccurate, false information. The respondent also contended that s 56A of the CJA defeated the purpose of an acquittal and discharge and amounted to a violation of his personal liberty as guaranteed by art 5(1) of the Federal Constitution (FC) and his rights of equality and equal protection as guaranteed by art 8(1) of the FC.

Held, admitting the respondent to bail at RM50,000 pending disposal of the appeal:

(1) In the context of the present case, any defect in the drafting of the terms

of the warrant would not affect the validity of the warrant issued on the authority of this court. There had not been a substantial miscarriage of justice as a result of the flawed terms. In any case, any defect in the drafting of the terms of the arrest had been overtaken by the subsequent event when the respondent was brought to this court for the inter partes hearing. This court had the jurisdiction to hear the second stage of the application notwithstanding any irregularity or flaw in the terms of the warrant of arrest (see para 18).

(2) The case of *The State (at the Prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison* [1985] IR 550 ('*The Governor of Mountjoy Prison*'s case') that was heavily relied upon by the respondent in its argument on the unconstitutionality of s 56A of the CJA could be distinguished from the present case. *The Governor of Mountjoy Prison*'s case related to a habeas corpus application challenging remand orders whereas the present case had to do with the respondent who was charged with the offence of drug trafficking and subsequently acquitted and discharged. Unlike the position in Ireland, our Court of Appeal was empowered under s 56A of the CJA to cause an accused person, who had been acquitted, to be arrested and committed to prison pending the disposal of the appeal against the acquittal. Further, by filing a notice of appeal against the acquittal, the applicant in the present case had revived the criminal proceedings against the respondent. This gave the Court of Appeal the jurisdiction to judge the respondent's guilt or innocence in respect of the drug trafficking charge against him (see paras 21–23).

(3) Section 56A of the CJA is a specific and explicit law that authorises the depravation of the personal liberty of the respondent who had been acquitted by the High Court on the drugs trafficking charge against him. As such, s 56A of the CJA did not violate arts 5(1) and 8(1) of the FC. By virtue of s 56A of the CJA read with art 121(1B) of the FC, this court was competent and empowered to cause an accused person to be arrested and committed to prison, or admit him to bail, pending the disposal of the appeal against the order of acquittal. Thus, s 56A of the CJA is valid and binding law and the respondent's attempt to strike down the judicial powers of this court as encapsulated in s 56A of the CJA was without any merit and ought to inevitably fail (see paras 29 & 36).

(4) The discretion of the court in making use of the power under s 56A, even though wide, was to be exercised judicially. Upon balancing the rights of the respondent and the interest of the State, the balance of justice lay in favour of admitting the respondent to bail at RM50,000 with two local sureties. As conditions of the bail, the respondent had to surrender his

travel documents, provide the address of his fixed place of residence, and report to the nearest police station every Monday at 5pm (see paras 37 & 42).

[Bahasa Malaysia summary

Responden, seorang warganegara Australia, telah dituduh dan dibicarakan kerana mengedar dadah berbahaya, satu kesalahan yang bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952. Dia telah dibebas dan dilepaskan atas kesalahan itu di Mahkamah Tinggi. Pendakwaan telah merayu ke Mahkamah Rayuan terhadap pembebasan itu. Pendakwaan telah memfailkan satu notis rayuan dan pada masa sama telah memohon secara ex parte ke Mahkamah Rayuan di bawah s 56A Akta Mahkamah Kehakiman 1964 ('AMK'), untuk perintah yang mengarahkan responden ditangkap dan ditahan secara reman sementara menunggu rayuan selesai. Satu waran tangkapan telah dikeluarkan terhadap responden. Dalam perbicaraan inter partes berhubung usul pemohon, pemohon berhujah bahawa s 56A AMK telah digubal dengan tujuan utama untuk mendapatkan kehadiran orang yang dituduh, yang telah dibebaskan oleh Mahkamah Tinggi, dalam perbicaraan rayuan terhadapnya. Responden telah menolak permohonan ini dan berhujah bahawa waran tangkap yang dikeluarkan terhadapnya adalah cacat di mana ia mengandungi maklumat yang tidak tepat dan palsu. Responden juga berhujah bahawa s 56A AMK telah gagal dalam tujuan pembebasan dan pelepasan dan membentuk pelanggaran kebebasan peribadinya sebagaimana yang dijamin oleh perkara 5(1) Perlembagaan Persekutuan ('PP') dan haknya berhubung kesaksamaan dan perlindungan yang sama rata sebagaimana dijamin oleh perkara 8(1) PP.

Diputuskan, membenarkan responden diikat jamin pada RM50,000 sementara menunggu rayuan selesai:

(1) Dalam konteks kes ini, apa-apa kecacatan dalam merangka terma-terma waran itu tidak menjejaskan keesahan waran yang dikeluarkan dengan kuasa mahkamah ini. Tiada pelaksanaan keadilan yang salah akibat daripada terma-terma yang cacat itu. Dalam apa kes, apa-apa kecacatan dalam merangka terma-terma berhubung tangkapan itu telah diatasi dengan kejadian berikutnya apabila responden dihadapkan ke mahkamah ini untuk perbicaraan inter partes. Mahkamah ini mempunyai bidang kuasa untuk mendengar peringkat kedua permohonan meskipun terdapat luar aturan atau kecacatan dalam terma-terma waran tangkapan itu (lihat perenggan 18).

(2) Dalam kes *The State (at the Prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison* [1985] IR 550 ('kes *The Governor of Mountjoy Prison*') yang mana responden bergantung kepada dalam hujahnya berhubung s 56A AMK yang tidak berperlembagaan boleh dibezakan dengan kes ini. Kes *The Governor of Mountjoy Prison* adalah berkaitan permohonan habeas corpus yang

mencabar perintah-perintah reman manakala kes ini adalah berkaitan responden yang telah dituduh dengan kesalahan mengedar dadah dan kemudian dibebas dan dilepaskan. Selanjutnya, dengan memfailkan notis rayuan terhadap pembebasan itu, pemohon dalam kes ini telah menghidupkan semula prosiding jenayah terhadap responden. Ini memberikan Mahkamah Rayuan bidang kuasa untuk mengadili kebersalahan atau ketidakbersalahan responden berkaitan pertuduhan pengedaran dadah terhadapnya (lihat perenggan 21–23).

(3) Seksyen 56A AMK adalah undang-undang spesifik dan jelas yang diberi kuasa untuk melucutkan kebebasan peribadi responden yang dibebaskan oleh Mahkamah Tinggi atas pertuduhan pengedaran dadah terhadapnya. Oleh itu, s 56A AMK tidak melanggari perkara-perkara 5(1) dan 8(1) PP. Menurut s 56A AMK dibaca bersama perkara 121(1B) PP, mahkamah ini adalah kompeten dan diberi kuasa untuk menyebabkan tertuduh ditangkap dan dipenjarakan, atau dibenarkannya diikat jamin, sementara menunggu rayuan selesai terhadap perintah pembebasan itu. Oleh itu, s 56A AMK adalah sah dan undang-undang mengikat dan percubaan responden untuk mengetepikan kuasa kehakiman mahkamah ini seperti mana yang terkandung dalam s 56A AMK adalah tanpa merit dan sepatutnya pasti gagal (lihat perenggan 29 & 36).

(4) Budi bicara mahkamah dalam menggunakan kuasa di bawah s 56A, meskipun luas, hendaklah dilaksanakan secara kehakiman. Apabila mengimbangi hak responden dan kepentingan negara, imbangan meletakkan keadilan memihak mengakui responden dan kepentingan kerajaan, imbangan keadilan memihak kepada membenarkan responden diikat jamin sebanyak RM50,000 dengan dua orang penjamin tempatan. Berhubung syarat-syarat jaminan, responden perlu menyerahkan dokumen perjalanannya, memberikan alamat tempat tinggal tetapnya, dan melaporkan diri di balai polis terdekat setiap Isnin pada pukul 5 petang (lihat perenggan 37 & 42).]

Notes

For a case on constitutionality, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2706.

For cases on warrant of arrest, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 916–922.

Cases referred to

Abdul Ghani Haroon v Ketua Polis Negara and another application (No 4) [2001] 6 MLJ 198; [2001] 3 CLJ 606, HC (refd)

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)

Balasingham v PP [1959] 1 MLJ 193 (refd)

Chairman, The; Railway Board & Ors v Mrs Chandrima Das & Ors (2002) 2 SCC 465, SC (refd)
Che Ani bin Itam v PP [1984] 1 MLJ 113 (refd)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)
Datuk James Wong Kim Min, Re; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min [1976] 2 MLJ 245, FC (refd)
Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33, FC (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)
Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Lim Kit Siang v Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383; [1987] 1 CLJ 40, SC (refd)
Ment & Ors v PP [1994] 1 MLJ 201, HC (refd)
Mohamad Ezam bin Mohd Nor, Re [2001] 3 MLJ 372, HC (refd)
Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP (Deputy PP) v Norman bin Ismail [2008] 4 MLJ 830; [2008] 5 CLJ 261, CA (distd)
PP v Dato' Yap Peng [1987] 2 MLJ 311; [1987] 1 CLJ 550, SC (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)
Queen-Empress v Gobardhan (1887) ILR 9 All 528, HC (refd)
R v Darby (1982) 40 ALR 594, HC (refd)
Saw Kim Hai & Anor v Reg [1956] 1 MLJ 21 (refd)
Shamim Reza bin Abdul Samad v PP [2011] 1 MLJ 471, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
State (at the Prosecution of Robert Trimbole otherwise known as Micheal Hanbury), The v The Governor of Mountjoy Prison [1985] 1 IR 550, SC (distd)
State of UP v Poosu and Another 1976 3 SCC 1, SC (folld)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289, CA (refd)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran [2006] 6 MLJ 689; [2007] 1 AMR 272, FC (refd)

Legislation referred to

Code of Criminal Procedure [IND] s 390
Constitution of India [IND] art 136
Constitutional of Ireland 1937 [IR] art 40
Courts of Judicature Act 1964 ss 38(1), 56A, 88
Courts of Judicature Act (Amendment) Act 1976 s 8
Criminal Procedure Code s 315
Dangerous Drugs Act 1952 s 39B(1)(a)

Federal Constitution arts 4(1), 5, 5(1), 8(1), 121(1B)
Fisheries Act 1985 s 15(1)(a)
Rules of the Court Appeal 1994 r 58, 58(3), (4)

Appeal from: Criminal Trial No 45A-13–05 of 2012 (High Court, Kuala Lumpur)

Saiful Edris bin Zainuddin (Ahmad Bache with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the applicant.
Mohammad Shafee bin Abdullah (Tania Scivetti with him) (Shafee & Co) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This is an application by the public prosecutor ('the applicant') by way of a notice of motion under s 56A of the Courts of Judicature Act 1964 ('CJA') seeking a warrant of arrest directing Bird Dominic Jude ('the respondent') be arrested and to remand him to prison pending the disposal of the applicant's appeal by this court.

[2] This application raises important constitutional issues. The respondent questioned the constitutionality of s 56A of the CJA. The respondent asserted that his fundamental rights guaranteed by arts 5(1) and 8(1) of our Federal Constitution ('FC') have been violated. In this regard, at the very outset, we would like to state that the right to personal liberty protected under art 5(1) and the equality right enshrined under art 8(1), are guaranteed by our FC to all persons including the respondent, who is a non-citizen of our country (see *An Introduction to the Constitution of Malaysia* by Tun Mohamed Suffian bin Hashim, (2nd Ed), at p 214, *Sheridan & Groves The Constitution Of Malaysia*, (5th Ed), p 61 and *The Chairman, Railway Board & Ors v Mrs Chandrima Das & Ors* (2002) 2 SCC 465). It should also be noted that as in any other countries, these rights are not absolute, and are subject to qualifications set out in the FC itself. We will discuss concerning these qualifications later on in this judgment.

[3] The background facts leading up to this application are quite simple and straightforward. In the High Court at Kuala Lumpur, the respondent, an Australian national, was charged and tried for trafficking in dangerous drugs, namely methamphetamine weighing in total 167.8g, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952, and punishable with mandatory death penalty. The offence was said to have been committed at a coffee outlet in Jalan Yap Kwan Seng, Kuala Lumpur on 1 March 2012.

[4] At the conclusion of the trial on 4 September 2013, the respondent was

acquitted and discharged by the High Court after the court ruled that the defence had succeeded in raising a reasonable doubt on the prosecution's case. The applicant being dissatisfied with the decision, filed a notice of appeal to this court on 9 September 2013. Meanwhile, on the very same day, the applicant took out a notice of motion seeking the following relief from this court:

(a) a warrant of arrest directing the respondent be arrested; and

(b) an order to remand the respondent to prison pending the disposal of the appeal.

[5] In support of the application, the applicant filed an affidavit, which was affirmed by deputy public prosecutor, Saiful Edris bin Zainuddin enumerating the grounds for the application.

[6] To appreciate the issues which arise for decision, it will be useful at this point to take a closer look at the relevant provisions in so far as they are relevant to the present application:

(a) art 4(1) of the Federal Constitution ('FC') states:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(b) art 5(1) of the FC provides:

> No person shall be deprived of his life or personal liberty save in accordance with law.

(c) art 8(1) of the FC stipulates:

> All persons are equal before the law and entitled to the equal protection of the law.

(d) s 56A of the CJA reads as follows:

> Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

(e) the relevant part of r 58 of the Rules of the Court Appeal 1994 ('RCA') provides:

> (3) As soon as Notice of Appeal is filed by the Public Prosecutor as in sub rule (1), the Court of Appeal may on an application by the Public Prosecutor issue a warrant directing that the accused be arrested and brought before it and may

remand him to prison pending the disposal of the appeal or admit him to bail in accordance with the provisions of section 56A of the Courts of Judicature Act 1964.

(4) The application under subrule (3) may be made by motion ex parte and for the purpose of this sub rule, sub rule 71 and 72 shall apply.

[7] Continuing with the sequence of events, upon the prosecution's application on an ex parte basis pursuant to r 58(3)–(4) of the RCA, this notice of motion came for hearing before this court on that very same morning of 9 September 2013. It is worth noticing at the outset that an application to remand must necessarily be preceded by a court order granting a warrant of arrest directing the respondent be arrested and brought before this court.

[8] We have read the ex parte application, the supporting affidavit and we have carefully considered the submissions of the learned deputy public prosecutor ('DPP'). At a later stage of this judgment, more will be said about the provision of s 56A of the CJA. Suffice for us to state here that the filing of the notice of appeal by the applicant is a fundamental and a condition precedent and if not complied with, this application cannot be entertained. We noted that the applicant has complied with the condition precedent in that the applicant has filed a notice of appeal in accordance with the provisions of r 58 of the RCA.

[9] We are satisfied that the applicant has fulfilled the threshold requirement to justify the granting of the interim order. The application is not frivolous or vexatious. We find that there is substance in the grounds as enumerated in the affidavit supporting the application. The affidavit disclosed the essential facts relating to this matter. We find that there is an arguable case to preserve the integrity of the appeal. We then issued a warrant of arrest against the respondent and also fixed the inter partes hearing on 10 September 2013.

[10] As events went, the warrant of arrest issued by us was duly executed and the respondent was brought before this court in the morning on the following day, 10 September 2013 for the hearing of the applicant's inter partes application of the notice of motion. The matter was then adjourned to 12 September 2013 to facilitate both parties to finalise their respective affidavits and to prepare their submissions as learned counsel for the respondent had indicated that the respondent intended to challenge the constitutionality of the provisions of s 56A of the CJA.

[11] At the hearing before us on 12 September 2013, the following arguments were canvassed by the learned DPP in support of the application. According to the DPP, s 56A is enacted for the sole purpose of securing the attendance of an accused person in the hearing of the appeal against him who

was earlier acquitted by the High Court. It is contended that even though the provision does not expressly say how it is to be exercised, judicial precedents have shown that it is to be exercised judicially. The learned DPP maintained that previous applications before this court and its equivalent s 88 of the CJA for the Federal Court, saw the courts in granting such order. He further maintained that the courts are aware that the prosecution has never ever abused this provision as it has been used very sparingly. Indeed, even though it is not a requirement, it has been a firm practice by the prosecution to apply for this order only when there is a strong likelihood of success in the appeal proper. In support of his argument, the learned DPP has referred us to the case of *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail* [2008] 4 MLJ 830; [2008] 5 CLJ 261. We will say more about this case later in this judgment.

[12] In resisting this application, learned counsel's arguments were two-pronged. First, he contended that the warrant of arrest was defective as the grounds contained therein were contrary to established facts and contained false accusation. And secondly, he contended that s 56A of the CJA violates the personal liberty of the respondent guaranteed by art 5(1) of the FC. Further, s 56A also violates the respondent's rights of equality and equal protection guaranteed by art 8(1) of the FC.

[13] We will now look in turn at these two prongs.

[14] Taking the first prong, learned counsel argued that the substance of the warrant of arrest which formed the basis and grounds for the issuance of the warrant was arbitrarily drafted without an iota of truth in it to secure the arrest of the respondent. In order to appreciate the arguments, it is necessary to reproduce the warrant of arrest which was in these terms:

> WARAN TANGKAP
>
> Dalam perkara Bird Dominic Jude (W/N Australia) (No. PP: N 4515698) yang beralamat di Kompleks Kementerian Dalam Negeri (KDN), No. 69, Jalan Sri Hartamas 1, 50480 Jalan Duta, Kuala Lumpur.
>
> Bahawasanya orang tersebut di atas telah dipertuduhkan atas kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952. Rayuan terhadapnya telah ditetapkan untuk dibicara pada 9 September 2013, jam 9.00 pagi di Mahkamah Rayuan Malaysia yang bersidang di Putrajaya.
>
> Bahawa kamu Responden dalam Rayuan ini yang diwajibkan di sisi undang-undang untuk hadir di Mahkamah Rayuan pada tarikh dan waktu tersebut di atas telah dengan sengaja gagal hadir di Mahkamah tersebut dan oleh yang demikian Mahkamah Rayuan Malaysia telah mengeluarkan waran tangkap ini mengarahkan kamu Responden ditangkap tanpa jaminan polis di bawah peruntukan Kaedah 56A Akta Mahkamah Kehakiman 1964 dan untuk dikemukakan di hadapan Mahkamah ini untuk direman sementara menunggu rayuan terhadap kamu diputuskan.

Maka sekarang ini kamu, Ketua Polis Negara, Malaysia dan semua Pegawai Polis yang lain adalah diarahkan menangkap orang yang dituduh yang tersebut di atas dan mengemukakannya di hadapan Mahkamah yang tersebut di atas dengan seberapa segera yang boleh.

Bertarikh pada 9 September 2013.

TIMBALAN PENDAFTAR

MAHKAMAH RAYUAN MALAYSIA

[15] Some confusion arise over the terms of the warrant. The learned DPP whilst conceding that the warrant of arrest contained inaccurate information, vehemently denied the serious allegation made by learned counsel for the respondent that it was constructed and executed arbitrarily with the ulterior motive to fictitiously orchestrate the existence of failure on the part of the respondent to appear on the said date and thus provide ample justification for the issuance of the said warrant of arrest. The learned DPP contended that the defect in the warrant of arrest is not fatal and does not affect the present application.

[16] We ourselves have read the terms of the warrant of arrest in detail. We find that the warrant has wrongly stated that the grounds of arrest was due to the failure of the respondent to appear before this court on 9 September 2013 for the purpose of the applicant's appeal against the respondent's acquittal and discharge. As can be seen in the early part of our judgment, the grounds of arrest as stated in the warrant does not accurately reflect the reasons why this court issued the warrant on 9 September 2013. It is therefore inaccurate to state in the warrant that the respondent 'sengaja gagal hadir di Mahkamah tersebut' when in fact no such notice has ever been issued by this court to request the respondent to appear before this court for the hearing of the appeal that never took place on 9 September 2013. However, we do not detect any ulterior motive on the part of the deputy registrar of this court who had approved and signed the terms of the warrant of arrest.

[17] Against the backdrop of the above, learned counsel contended that due to the illegality of the arrest via the defective warrant and its improper execution on the respondent, any remand pursuant to such illegality would also be deemed unlawful vis a vis nullifying any remand made pursuant to s 56A of the CJA with respect to this case.

[18] In our view, the contention of learned counsel is not free from difficulties. The point which has a strong bearing on this issue is that, as we have said earlier, at the first stage of the ex parte application, the applicant has fulfilled the threshold requirement to justify the granting of the warrant of arrest directing the respondent to be brought before this court. That warrant,

was in point of fact, issued pursuant to a valid legal power of this court. It had been executed and the respondent was brought before this court on 10 September 2013. What stands out is that on a matter of substance, the warrant itself emphatically makes reference to the provision of s 56A of the CJA and the order of this court given on 10 September 2013. Therefore, in the context of the present case, any defect in the drafting of the terms of the warrant would not affect the validity of the warrant issued on the authority of this court. When look in this way, one can see that there has not been a substantial miscarriage of justice as a result of the flawed terms. Further, this court is now required to consider the second stage of the application, either to remand the respondent to prison or admit him to bail. In our judgment, any defect in the drafting of the terms of the warrant of arrest is irrelevant in determining the second stage of the application (see *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 and *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689; [2007] 1 AMR 272. As we see it, any irregularity of the initial arrest arising from the flawed terms of the warrant of arrest has been overtaken by subsequent event when the respondent was brought to this court on 10 September 2013. In our view, this court has the jurisdiction to hear the second stage of the application notwithstanding of any irregularity or flaw in the terms of the warrant of arrest (see *Saw Kim Hai & Anor v Reg* [1956] 1 MLJ 21).

[19] The second prong that requires to be addressed is the more difficult question taken by learned counsel concerning the unconstitutionality of s 56A of the CJA. This is an important and crucial point into which we must look closely. The main thrust of the contention of learned counsel is this. Section 56A must be deemed unconstitutional especially in the light that it is a provision of law which allows a 'de facto stay' on the effect of the judgment of an acquittal and discharge of an individual, by subsequently detaining that very individual when he has obtained a court pronouncement of his innocence or at least a 'not guilty' verdict. It is contended that any substantive application of s 56A would render any pronouncement of the innocence of an individual by the courts redundant as his very right to freedom, liberty and life granted by the courts was negated by the re-arrest and subsequent detention. Learned counsel argued that the construction of s 56A especially in the light that a warrant of arrest can be made ex parte pursuant to r 58(3)–(4) of the RCA would defeat the purpose of an acquittal and discharge, and would be prone to abuse by the authorities as it allows the arrest of a person not suspected of a crime but rather a person exonerated from it. Learned counsel then invited this court to consider whether it is justified to arrest and detain an individual not suspected of a crime but rather a person who has been judicially pronounced as innocent or not guilty. The very act of arresting and detaining the respondent creates pre supposition on his guilt which is contrary to the pronouncement of his innocence.

[20] It is on that fundamental basis, learned counsel emphasised that the rights of liberty and life of an individual enshrined and protected under arts 5(1) and 8(1) of the FC should not be infringed despairingly, especially in the light that the respondent having been acquitted of the offence charged, the very act of arresting him is depriving him of his enjoyment of life and liberty of which he is entitled to, especially after a long and arduous trial. Learned counsel urged this court to intervene and protect such constitutional rights. To allow the arrest and detention of the respondent under s 56A, argued learned counsel, would be rendered unconstitutional as it clearly prejudiced the liberty of the respondent entitled under art 5(1) as well as the equality right under art 8(1) of the FC. He maintained that s 56A is clearly ultra vires as pitted against of the above articles read with art 4(1) of the FC. In support of his contentions, learned counsel has drawn to our attention, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631, *The State (at the Prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison* [1985] 1 IR 550, *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, *R v Darby* (1982) 40 ALR 594, *Ment & Ors v Public Prosecutor* [1994] 1 MLJ 201, *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38, *Abdul Ghani Haroon v Ketua Polis Negara and another application (No 4)* [2001] 6 MLJ 198; [2001] 3 CLJ 606, *The Chairman, Railway Board & Ors v Mrs Chandrima Das & Ors* (2002) 2 SCC 465, *Government of Malaysia and Ors v Loh Wai Koong* [1979] 2 MLJ 33, *Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471 and *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64.

[21] The principles as stated in all these cases are all well established and cannot be disputed. That's why, it is unnecessary for us to discuss in detail all these cases, save the case of *The State (at the Prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison*, where heavy reliance was placed by learned counsel. There, the High Court of Ireland after an inquiry pursuant to art 40 (equivalent to our art 5) of their constitution to determine the lawfulness of the arrest of the subject held that there was illegality in the original arrest and the subject was immediately release. The respondent applied to the Supreme Court of Ireland for a stay on the order of the High Court to release the subject pending the appeal. The Supreme Court refused to grant a stay on the order of the High Court where the detainee was released from detention on the basis that the provisional warrant of arrest amounted to a deliberate and conscious violation of the detainee's constitutional rights.

[22] We have read and gave our consideration of the judgment of *The State (at the Prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison* to point the difference of that case from the present case. It is necessary to appreciate what our case concerns. Unlike *The*

State (at the Prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison, which relates to a habeas corpus application challenging remand orders, our case has to do with the respondent who was charged with the offence of drugs trafficking and was subsequently acquitted and discharged. The respondent then appealed to this court. Unlike the position in Ireland, our Court of Appeal is empowered under s 56A of the CJA to cause an accused person, who has been acquitted, to be arrested and committed to prison pending the disposal of the appeal against the acquittal. No such statutory power has been conferred on the Irish Supreme Court.

[23] Moreover in the present case, as we have said earlier, the applicant has filed a notice of appeal against the acquittal decision of the High Court. In the context of the present case, this is an important point considering that an appeal is a continuation of a trial (see *Balasingham v Public Prosecutor* [1959] MLJ 193, *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613 and *Mallal's Criminal Procedure* (6th Ed), para 10452). Consequently, the criminal proceedings against the respondent revive. This gives jurisdiction to the Court of Appeal to judge the respondent's guilt or innocence in respect of the drug trafficking charge against him (see *State of UP v Poosu and Another* 1976 3 SCC 1). Viewed in this way, the power to remand the respondent or admit him to bail pending the disposal of the applicant's appeal by this court is necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the respondent. In *State of UP v Poosu and Another*, the Indian Supreme Court cited the case of *Queen-Empress v Gobardhan* (1887) ILR 9 All 528 where Sir John Edge, Chief Justice emphasised that it is not desirable that, pending the appeal against acquittal in a capital case, the prisoner should remain at large while his fate is being discussed by the High Court.

[24] Coming back to the contention by learned counsel concerning the unconstitutionality of s 56A, there can be no doubt that according to art 4(1) of the FC, the FC, including arts 5(1) and 8(1), is the supreme law and 'any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. The effect of the doctrine of supremacy of the FC is clearly stated by the Federal Court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112. Suffian LP in delivering the judgment of the court said:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please. Under our Constitution written law may be invalid on one of these grounds:
>
> (1) In the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of state written law because it relates to a matter which respect to which the State legislature has no power to make law, art 74; or

(2) In the case of both Federal and State written law, because it is inconsistent with the Constitution, see art 4 (1); or

(3) In the case of State written law, because it is inconsistent with Federal law, art 75.

[25] Article 5(1) of the FC stipulates that no person shall be deprived of his life or personal liberty save in accordance with law. The expression 'personal liberty' relates to liberty concerning the body of the individual (see *Government of Malaysia & Ors v Loh Wai Kong* and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481). As we have noted earlier, this right to personal liberty is not absolute and is subject to qualifications. The key to the issue herein lies in the phrase 'save in accordance with law'. Hence, no person (including the respondent) can be arrested, detained or imprisoned unless authorised by law (see *An Introduction to the Constitution of Malaysia* by Tun Mohamed Suffian bin Hashim, (2nd Ed), at p 207).

[26] The position in law is fairly well settled. In a matter as fundamental and important as the personal liberty of the person, strict compliance with statutory requirements must be observed in depriving a person of his liberty (see *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 2 MLJ 245). It is important therefore to consider the phrase 'save in accordance with law'. In *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372, it was held that the phrase 'save in accordance with law' in art 5(1) requires that there must be specific and explicit law that actually provides for it. The Federal Court in the case of *Che Ani bin Itam v PP* [1984] 1 MLJ 113 has adopted the meaning of the word 'law' in the phrase 'save in accordance with law' in art 5(1) given by the Privy Council in the Singapore case of *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* where it was held that the term 'law' in the phrase refers to:

> … a system of law which incorporates those fundamental rules of natural justice that had formed part of the common law of England and was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that 'law' which citizens could have for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.

[27] Reverting to the present case, the respondent complains of the encroachment and deprivation of his personal liberty. He has been arrested and his freedom of movement is taken away. Learned counsel argued that a person who has endured the rigorous process of a criminal trial and nevertheless has been acquitted thereof should not then have his rights to freedom infringed in view of the judicial pronouncement of his innocence. It is contended that such

an act to re-arrest a person who has been acquitted would clearly offend his constitutional rights under arts 5(1) and 8(1) of the FC.

[28] No doubt, the respondent was arrested at the low cost carrier terminal just before boarding flight for Australia. This would amount to a deprivation of his 'personal liberty' within art 5(1) of the FC. The following question then arises: whether there is a law authorising such deprivation. This then brings into direct focus the provision of s 56A which has been inserted by Parliament vide s 8 of the Courts of Judicature Act (Amendment) Act 1976 ('Act A328') (which came into force on 23 January 1976). The language of the provision is plain and unambiguous. Section 56A is somewhat wide in its provisions and enables the Court of Appeal to issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail. The section is manifestly in two parts. The first part gives discretionary authority to the Court of Appeal, more often than not on the basis of an ex parte application, to issue a warrant of arrest directing that the accused person be arrested and brought before it. The second part provides that upon the accused person is brought before this court, this court is then required, on an inter partes basis, to consider either to remand the accused person or admit him to bail. The rationale of this provision is quite obvious. This substantive and comprehensive provision was designed to confer judicial power upon this court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. Judicial power has been defined to mean that the court has the power to adjudicate in civil and criminal matter which are brought to the court (see *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550). The point to make here is this: the legislature has expressly empowered the Court of Appeal to cause an accused person to be arrested and committed to prison or admitted to bail, pending the disposal of the appeal against acquittal. In this regard, it is imperative to underline that our FC itself authorises Parliament to make laws providing the Court of Appeal with the discretionary powers to remand the accused to prison, or admit him to bail pending the disposal of the prosecution's appeal (see art 122(1B) of the FC). Indeed, in this regard, the FC has entrusted to an independent judiciary the task of interpreting all laws enacted by the legislative arm of the government (see *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289. It is in the interests of justice for this court to give full effect of the provisions, and this court is bound to do so, if it is essential to the just decision of a case.

[29] For the foregoing reasons, we conclude by saying that s 56A of the CJA is a specific and explicit law that authorises the depravation of the personal liberty of the respondent who has been acquitted by the High Court on the drugs trafficking charge against him.

[30] The next issue to consider is the contention of learned counsel for the respondent that s 56A would be prone to abuse by the authorities as it allows the arrest of a person not suspected of a crime, but rather a person exonerated from it. In this regard, learned counsel refer to the case of *Lee Kwan Woh v Public Prosecutor*, which held that the effect of art 8(1) of the FC is to emphasise that legislative and judicial action is objectively fair and that it also houses within it the doctrine of proportionality, which is the test to be used when determining whether any form of state action (Executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[31] For the proper determination of this contention, it must be borne in mind two things. In the first place, it must be pointed out that this large discretionary power under s 56A of the CJA is conferred not on the Executive or the administration branch, but is unmistakably conferred on the Court of Appeal. Further, we must never lose sight of the fact that, as a matter of principle of great importance, in deciding on a dispute, our courts act according to the rules of natural justice and rule of law. And rules of natural justice and rule of law are inimical to arbitrary or excessive exercise of discretionary powers. The role of our courts as the avenue for justices and redress was aptly explained by His Lordship Salleh Abas LP in the case of *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383; [1987] 1 CLJ 40, as follows:

> When we speak of government it must be remembered that this comprises three branches, namely, the legislature, executive and the judiciary. The courts have a constitutional function to perform and they are the guardians of the constitution within the terms and structure of the constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of Judges overlegislators but of the constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the constitution and act within the provisions of and in accordance with the law.

[32] The second thing that is important to keep in mind is that, as a matter of judicial practice, before our courts exercise its discretion, there are procedural safeguards and fairness that should be followed in respect of an application of this nature. Take this very case. The respondent is given every opportunity of presenting his case in court before he is affected by the operation of the provisions of s 56A. He has engaged a lawyer of his own choice,

who is willing and able to represent him and to argue his case before us. He has filed two affidavits stating the relevant facts, circumstances and information having a bearing on the case. It cannot be emphasised enough that the requirement to observe natural justice or procedural fairness is an integral part and cornerstone of our judicial proceedings. The rule of natural justice that no man may be condemned unheard applies to every case where an individual is adversely affected by judicial decision (see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152). The *audi alteram partem* rule, or the rule requiring a hearing is of central importance in our court proceedings. Over and above this, in the administration of justice in our country, the rule requiring fair hearing before a decision is the *sine qua non* in any of our courts proceedings. Certainly, therefore, s 56A of the CJA incorporates the fundamental rules of natural justice adverted to in the case of *Ong Ah Chuan v Public Prosecutor*, which we have referred to earlier in our judgment. It is not an issue here that by virtue of the underlying principle of art 8(1) of the FC (see *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 and *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, s 56A of the CJA operates alike on all persons under like circumstances, not simply it must operate alike on all persons in any circumstances.

[33] On the issue of arbitrariness as raised by learned counsel for the respondent, it is true that s 56A is couched in very broad language giving wide discretion to the Court of Appeal. Admittedly, the provision does not lay down standard to guide the exercise of the discretionary powers. Even though the discretionary powers should be interpreted by the words used in the section itself, nevertheless, to ensure that the discretion is properly exercised judicially and not arbitrarily, our courts have laid down principles and considerations subject to which the power is to be exercised, as can be seen in the following cases.

[34] The first case is *Ment & Ors v Public Prosecutor*, which was referred to by learned counsel for the respondent. There, the applicants, nine Thai nationals, were charged and acquitted for fishing in Malaysian fisheries waters without a permit under s 15(1)(a) of the Fisheries Act 1985. The High Court in that case allowed the public prosecutor's application for the court to issue a warrant directing the applicants to be committed to prison or admitted to bail pending disposal of the appeal under s 315 of the Criminal Procedure Code, which is substantially the same as s 56A of the CJA. Vincent Ng JC (as he then was) said:

> The learned DPP has now applied under s 315 of the Code to this court to issue a warrant directing that the accused be committed to prison or admitted to bail pending disposal of the appeal. It is in the discretion of the High Court to exercise the power under the section. This section is meant not for the protection of the accused but to ensure that the accused against whom an appeal has been filed would not abscond during the pendency of the appeal.

The provision under s 315 of the Code makes for practical sense as the judge hearing the application under this provision is also clothed with inherent powers to order an early hearing of the appeal, expeditious completion of the record of appeal and even to fix a date for prompt disposal of the appeal itself in the event that such discretion is exercised by the judge.

However, in view of the long period usually taken for the disposal of appeal (unless otherwise ordered) thereby causing hardship to the defendant or accused, in whose favour the presumption of innocence stands fortified by the acquittal by the trial court, the High Court in exercising its jurisdiction under s 315 of the Code has to bear in mind the following:

(a) The provisions of s 315 also exhibit an intention of the legislature that the grant of bail is the rule and committal to prison without bail is an exception.

(b) The discretion in favour of the prosecution is exercised only sparingly and upon being satisfied that there are special circumstances to move the court.

(c) The quantum of bail set should be realistic and should not be such as to have the effect of depriving the person, who stands acquitted of the charge, of his liberty.

(d) The mere fact of an admission of appeal to the High Court from the decision of the magistrate's court does not by itself constitute special circumstances.

(e) It is desirable to also order an early hearing of the appeal itself should the court's discretion under this section be exercised.

[35] The second case is *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail*, which was brought to our attention by the learned DPP. The background facts of that case are quite similar with the present case. In that case, the accused had been acquitted and discharged of drug trafficking in the High Court. The prosecution appealed to the Court of Appeal against the acquittal. The accused was an Indonesian without any travel documentation and had, since his acquittal, been detained by the immigration authorities. The prosecution applied ex parte to the Court of Appeal under s 56A of the CJA, for an order directing the accused be remanded pending the disposal of its appeal. The accused was arrested on the prosecution's application and the issue for the Court of Appeal to decide was whether it was just and proper to remand the accused to prison, or admit him to bail pending the disposal of the prosecution's appeal. We think it is important that we repeat here in extenso, with the necessary emphasis, what His Lordship Low Hop Bing JCA said in delivering the judgment of the court:

The consideration of the order for remand or bail requires the construction of the second limb of s 56A. This court has to exercise the discretion judicially and according to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case.

Although the exercise of discretion by this court is not unprincipled, it is impossible and impracticable to set out a rigid formula in this regard.

As a general rule, when an accused has been acquitted by the High Court, he remains a free man and every effort should be made to give effect to the order.

However, this general rule must now be read in conjunction with the provisions of s 56A as alluded to above. It is the duty of this court to ascertain the intention of Parliament as expressed in s 56A.

Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred.

The purpose of enacting s 56A may be discerned from the explanatory statement to the Courts of Judicature Amendments (No 2) Act 1975 Bill. The relevant portion of this explanatory statement reads as follows:

> This Bill seeks to amend the Courts of Judicature Act, 1964 … for the following purposes:
>
> (a) …
>
> (b) to empower the Public Prosecutor to appeal to the Federal Court against any decision made by the High Court in the exercise of its criminal jurisdiction at first instance.

The purpose of s 56A is clearly to empower the prosecution to appeal against an acquittal ordered by the High Court. By way of corollary, it is intended to preserve the integrity of the prosecution's appeal.

The amendment expressed in s 56A serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the State.

It needs to be noted that an appeal is a continuation of a trial; see eg *Balasingham v Public Prosecutor* [1959] 1 MLJ 193 (HC) per Ismail Khan J (later CJ (Borneo).

The integrity of the prosecution's appeal can only be preserved if the accused is placed in such a position as to conduce to the hearing and determination of the appeal in due course, which can never be realised in the absence or non-attendance of the accused. Hence, s 56A must be construed so as to promote that purpose.

[36] Therefore, in the upshot, from the foregoing discussion, there can be no doubt that s 56A does not violate arts 5(1) and 8(1) of the FC. By virtue of s 56A read with art 121(1B) of the FC, this court, pending disposal of an appeal against an order of acquittal, is competent and empowered to cause an accused person to be arrested and committed to prison, or admit him to bail. This

attempt by the respondent to strike down the judicial powers of this court, as encapsulated in s 56A of the CJA, is without any merit and must inevitably fail. Section 56A of the CJA is a valid and binding law.

[37] As we have explained earlier, the discretion of the court in making use of the power under s 56A, even though wide, is to be exercised judicially. Whether in the circumstances of the case, the attendance of the accused person at the hearing of the prosecution's appeal can best be secured by committing him to prison or admitting him to bail, is a matter which rests solely in the discretion of the court. It is appropriate at this juncture, without laying down any inflexible rule, we set out the factors that this court should consider in exercising its jurisdiction under s 56A of the CJA. The list of the considerations is not exhaustive and there may be other considerations as well which may emerge from the facts and circumstances of each case. Generally speaking, this court would take into account the following:

(a) the order made must be objectively fair and proportionate;

(b) the discretion should never be exercised arbitrarily;

(c) the discretionary power should be sparingly invoked;

(d) the nature and seriousness of the offence;

(e) the accused person has been proven not guilty and has been acquitted; there is a presumption of innocence in favour of the accused person;

(f) it is in the interest of the public and the state to preserve the integrity of the prosecution's appeal;

(g) the absence or non-attendance of the accused person at the hearing of the prosecution's appeal will render the appeal nugatory;

(h) the length of time which is likely to take for the appeal to be heard;

(i) if bail is admitted, whether the security and conditions imposed will ensure the attendance of the accused person;

(j) the probability of the accused person absconding, if released on bail;

(k) a balance has to be struck between the right to individual liberty and the interest of the public and state; and

(l) where the issue relates to the safety and security of the state much weight will be given to the application of the public prosecutor.

[38] Here, we also need to consider one further argument advanced by learned counsel for the respondent. Learned counsel argued that it would not be just for the respondent to be arrested and detained on the basis only of an appeal filed by the applicant. Learned counsel argued that it must also be

shown beyond reasonable doubt by the applicant that the judgment of the learned High Court judge was so perverse on the face of the record that the arrest and detention is justified to prevent an injustice from further occurring. Learned counsel maintained that a mere allegation of incorrect decision by the High Court judge is not enough, nor sufficient to deprive a person of his liberty that has been deservingly earned after a full trial. Learned counsel relied on *State of UP v Poosu and Another* to support his contention that the applicant must demonstrate that the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice.

[39] We find ourselves quite unable to agree with the arguments. Section 390 of the Indian Code of Criminal Procedure, in substance, is equipollent with our s 56A of the CJA. Section 390 has never been declared as unconstitutional in India. It is important to note that in *Poosu*'s case, the Indian Supreme Court was exercising its supervisory jurisdiction under art 136 of the Indian Constitution. The said art 136 reserves supervisory jurisdiction over decision of all courts and tribunal. The Supreme Court has set out some guidelines as to how powers under s 390 should be exercised, which ordinarily will be the basis for our Court of Appeal here when it is exercising its powers under s 56A. The guidelines has been summarised in the head notes to *Poosu*'s case as follows:

> Whether in the circumstances of the case, the attendance of accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant, is a matter which rests entirely in the discretion of the court. Although the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the court would take into account the various factors, such the nature of and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and state. In addition, the court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing in the Supreme Court.

[40] As can be seen earlier, we have no difficulty in adopting some of the guidelines as laid down in *Poosu*'s case. With respect, it should be added that without the benefit of the written judgment and the notes of proceedings of the High Court, we are not in a position to say that the order of acquittal recorded by the High Court is perverse or clearly erroneous on the face of the record. In our view, the merits of the applicant's appeal in a s 56A application is not a relevant matter for consideration.

[41] So far we have expressed our views on the law. Finally, we next move to consider the merit of the present application. Applying what we have earlier set out as the factors which this court would take into account, in order to preserve the integrity of the prosecution's appeal, we have considered and deliberated with care whether or not it is just and proper to remand the respondent to prison or admit him to bail, pending the disposal of the appeal. In the first place, it is very likely that in accordance with s 38(1) of the CJA, the applicant's appeal can be heard as soon as possible. In the present case even though the respondent is a foreigner, he has a valid travel document, unlike in the case of *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail*. In balancing the rights of the respondent and the interest of the state, we refer to the dictum of Gopal Sri Ram JCA in the case of *Lee Kwan Woh v Public Prosecutor*, which was drawn to our attention by learned counsel for the respondent, where His Lordship held:

> In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as 'life' and 'personal liberty' in art 5(1).
>
> The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used in determining whether any form of state action (executive, legislative, or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed …

[42] Upon balancing all the relevant factors, we hold that the balance of justice lies infavour of admitting the respondent to bail at RM50,000 in two local sureties, and in default, a warrant be issued committing the respondent to prison until the disposal of the applicant's appeal against the acquittal decision of the learned High Court judge. As conditions of the bail, (a) the respondent has to surrender his travel documents, (b) the respondent must provide the address of his fixed place of residence, and (c) the respondent must report to the nearest police station every Monday at 5pm. We also order that the record of appeal be made ready to this court as soon as possible and that an early date be fixed for the hearing of the appeal.

Respondent admitted to bail at RM50,000 pending disposal of the appeal.

Reported by Kohila Nesan